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Ambiga a/p Sreenevasan v Director of Immigration, Sabah, Noor Alam Khan bin A Wahid Khan & Ors

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COURT OF APPEAL (KOTA KINABALU) — CIVIL APPEAL NO S-01(IM)(NCVC)-362–11 OF 2015
ZAWAWI SALLEH, ABANG ISKANDAR AND AHMADI ASNAWI JJCA
7 JUNE 2017

C

Immigration — Prohibition against entry — Whether decision to prohibit entry judicially reviewable — Sabah State Authority denied appellant permission to enter Sabah to speak at political forum and gave no reasons for its decision — Whether s 59A of the Immigration Act 1959/63 ('the Act') clearly prohibited
D *state authority's decision from being judicially reviewed except on grounds of procedural non-compliance with the Act — Whether Act did not provide that state authority had to give reasons for its decision or that appellant had to be given opportunity to be heard — Whether appellant could not rely on doctrine of legitimate expectation as state authority had prerogative/discretionary power to*
E *decide who should be allowed to enter Sabah and no representation/promise was ever made to appellant that she would not be refused permission to enter Sabah to engage in legitimate political activity*

The appellant wrote to the first respondent ('R1') to enquire whether there was
F any bar against her entering Sabah to speak at a public forum. R1 replied that the appellant's 'application' was forwarded to the state authority and that it was rejected ('the impugned decision'). The appellant then wrote to R1 asking the reason for the impugned decision but she never received a reply. The appellant applied by way of judicial review to quash the impugned decision and to
G compel the respondents to allow her to enter Sabah because she had previously entered Sabah without objection or restriction from the state authority and also because other speakers from West Malaysia had been allowed entry to participate in the forum. The High Court dismissed the appellant's application on the ground that: (a) the ouster clause in s 59A of the Immigration Act
H 1959/63 ('the Act') clearly provided that any act done or decision made by the state authority under the Act was not subject to judicial review ('the non-justiciability issue') except on grounds of procedural non-compliance with the requirements of the Act; and (b) the court was only concerned with the decision-making process and not whether the impugned decision was fair and
I reasonable. In the instant appeal, the appellant challenged the impugned decision both on the non-justiciability issue as well as on merits. With respect to the non-justiciability issue, she contended that ouster clauses should not

bind the court where an error of law had been committed or where an unfair procedure had been employed or where the impugned decision was so unreasonable that no reasonable tribunal similarly circumstanced would have made it. The appellant submitted that Parliament's intention to introduce s 59A into the Act was to curb the problem of illegal immigrant; hence, in deciding her case, the Federal Court's decision in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72 ('*Sugumar*'s case') — where, pursuant to s 59A of the Act, the Sabah Immigration Authority had cancelled Sugumar Balakrishan's entry permit to reside in Sabah — should not be followed. In *Sugumar*'s case, the Federal Court upheld the cancellation of the permit holding, inter alia, that constitutional rights under the Federal Constitution were not absolute and could be taken away by legislation and if the legislation clearly provided that the removal of the right could not be questioned by way of judicial review, the court had to give effect to that provision. With regard to merits, the appellant argued that the respondents had: (i) breached her fundamental liberties under arts 5(1), 8(1) and 9(2) of the Federal Constitution; (ii) acted in excess of, or without, jurisdiction, ultra vires, mala fide, in abuse of power and without complying with procedure; (iii) violated her legitimate expectations to be treated equally, to be given a reason for the impugned decision, and to be given a right to be heard; and (iv) acted in a manner that fell under '*Wednesbury* unreasonableness'. The respondents submitted that the court should uphold the clear provisions of the Act without modification or qualification and find that the Act did not require any reasons to be given for the impugned decision or for the appellant to be given an opportunity to be heard. The respondents said the contention of legitimate expectation was an afterthought not raised in the appellant's affidavits and, in any event, it could not be used to override the express statutory power vested in the state authority. The respondents said the argument that they had violated the appellant's fundamental liberties under the Federal Constitution did not arise because the impugned decision was made in compliance with the direction given by the state authority.

Held, dismissing the appeal:

(1) The intention of Parliament to exclude judicial review was clearly manifested by the unmistakable and unambiguous language of s 59A(1) of the Act. The words in that section were clear and supported the conclusion that the jurisdiction of the court was ousted except on grounds of procedural non-compliance with the requirements of the Act or regulations governing the act or decision and nothing else (see para 17).

(2) There was no merit in the appeal. The questions of law posed for determination in the instant appeal were the same as those that were posed in *Sugumar*'s case. The facts and issues in both cases were the same

and the doctrine of precedent dictated that cases must be decided in the same way when their material facts and issues were the same. The decision in *Sugumar*'s case was not based upon grounds of public policy but on purely legal principles. There was no other precedent or decided case on s 59A of the Act of equal weight which stood for the opposite proposition which this court could follow. There was no rhyme or reason for this court to depart from the decision in *Sugumar*'s case which was correctly decided based on sound principles of law (see paras 34(a)–(d), 36 & 55).

(3) The appellant's allegation that the respondents had breached her fundamental liberties under arts 5(1), 8(1) and 9(2) of the Federal Constitution were issues that were already decided upon by the Federal Court in *Sugumar*'s case. With regard to the issue that no reason was given for the impugned decision, the respondents were statutorily not required to give any reasons. As decided by the Federal Court in *Sugumar*'s case, s 65 of the Act did not impose an express duty on the respondents to give reasons to the appellant. Also, the first respondent could not be have been expected to provide reasons since he was merely carrying out the directions of the state authority and, in exercise of the powers conferred upon it by s 65(1) of the Act, the state authority was not required to give reasons (see paras 44 & 49).

(4) The right to be heard was not stipulated or provided for in ss 59 and 65 of the Act. Under s 59, any order of the state authority did not require the giving of an opportunity to be heard. The first respondent had no discretion but to refuse entry as directed by the state authority; hence, his act or decision also enjoyed the exclusion of the right to be heard. The first respondent and the state authority could not be said to have deprived the appellant of the right to natural justice as there could not be any breach where none existed in law. In the absence of any provision as to the mode of inquiry/right to be heard in s 65 of the Act, no question of failure to observe the principles of natural justice could arise (see para 50).

(5) Although the appellant was allowed to enter Sabah in the past without objection or obstruction, that could not be the basis for her to rely on the doctrine of legitimate expectation since: (a) the appellant's affidavits never stated the purpose of her past visits — whether it was as a tourist or as a speaker in any forum pursuant to s 67 of the Act; (b) nothing in the appellant's affidavits showed that the respondents made any promise or representation that her entry into Sabah for the purpose under s 67 would not be refused; (c) legitimate expectation could not and should not override the express statutory power vested in the state authority; and (d) the Act expressly provided that the grant of an entry permit/pass to

enter Sabah was within the prerogative or discretionary power of the state authority. Accordingly, no substantive legitimate expectation arose in the appellant's favour (see para 54).

[Bahasa Malaysia summary

Perayu menulis kepada responden pertama ('R1') untuk bertanya sama ada terdapat apa-apa halangan terhadapnya untuk memasuki Sabah untuk bercakap di forum awam. R1 menjawab bahawa 'application' perayu telah diajukan kepada pihak berkuasa negeri dan bahawa ia telah ditolak ('keputusan yang dipersoalkan'). Perayu kemudiannya menulis kepada R1 meminta alasan bagi keputusan yang dipersoalkan tetapi dia tidak pernah mendapat jawapan. Perayu memohon melalui semakan kehakiman untuk membatalkan keputusan yang dipersoalkan dan untuk memaksa responden-responden untuk membenarkan dia memasuki Sabah kerana dia sebelum ini telah memasuki Sabah tanpa bantahan atau halangan daripada pihak berkuasa negeri dan juga kerana penceramah-penceramah lain dari Malaysia Barat telah dibenarkan masuk untuk menyertai forum tersebut. Mahkamah Tinggi menolak permohonan perayu atas alasan bahawa: (a) klausa penyingkiran di dalam s 59A Akta Imigresen 1959/63 ('Akta') jelas memperuntukkan bahawa apa-apa tindakan yang dibuat atau keputusan yang dibuat oleh pihak berkuasa negeri di bawah Akta tidak tertakluk kepada semakan kehakiman ('isu tidak boleh diadili') kecuali atas alasan ketidakpatuhan prosedur dengan kehendak Akta; dan (b) mahkamah hanya prihatin dengan proses membuat keputusan dan bukan sama ada keputusan yang dipersoalkan adalah adil dan munasabah. Dalam rayuan ini, perayu mencabar keputusan yang dipersoalkan tersebut atas kedua-dua isu tidak boleh diadili dan juga atas merit. Berkaitan kepada isu tidak boleh diadili, dia berhujah bahawa klausa-klausa penyingkiran patut tidak mengikat mahkamah di mana kesilapan undang-undang telah dilakukan atau di mana prosedur tidak adil telah digunakan atau di mana keputusan yang dipersoalkan adalah langsung tak munasabah sehingga tribunal yang munasabah yang keadaan sama akan membuatnya. Perayu berhujah bahawa niat Parlimen untuk memperkenalkan s 59A ke dalam Akta adalah untuk membendung masalah pendatang tanpa izin; maka, dalam memutuskan kesnya, keputusan Mahkamah Persekutuan di dalam kes *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72 ('kes *Sugumar*') — di mana, berikutan s 59A Akta, Pihak Berkuasa Imigresen Sabah telah membatalkan permit kemasukan Sugumar Balakrishan untuk tinggal di Sabah — tidak patut diikut. Dalam kes *Sugumar* Mahkamah Persekutuan mengesahkan pembatalan permit dengan memutuskan, antara lain, bahawa hak perlembagaan di bawah Perlembagaan Persekutuan adalah tidak mutlak dan boleh diambil oleh undang-undang dan jika undang-undang jelas memperuntukkan bahawa penyingkiran hak tidak boleh dipersoalkan melalui semakan kehakiman, mahkamah perlu memberi kesan kepada peruntukan tersebut. Berkaitan merit, perayu berhujah bahawa responden-responden telah: (i) melanggar hak kebebasan asasnya di bawah perkara 5(1), 8(1) dan 9(2) Perlembagaan

A Persekutuan; (ii) bertindak berlebihan, atau tanpa bidang kuasa, ultra vires, mala fide, penyalahgunaan kuasa dan tidak mematuhi prosedur; (iii) mencabuli harapan yang sahnya untuk dilayan sama rata, diberi alasan bagi keputusan yang dipersoalkan tersebut, dan diberi hak untuk mendengar; dan (iv) bertindak dalam cara yang terangkum di bawah '*Wednesbury* B unreasonableness'. Responden-responden berhujah bahawa mahkamah sepatutnya menegaskan peruntukan jelas Akta tanpa pengubahsuaian atau kelayakan dan mendapati bahawa Akta tidak mengkehendaki apa-apa alasan untuk diberikan bagi keputusan yang dipersoalkan tersebut atau untuk perayu diberi peluang untuk didengar. Responden-responden menyatakan hujahan C harapan yang sah adalah sesuatu yang difikirkan kemudian yang tidak dibangkitkan di dalam afidavit perayu dan, walau bagaimanapun, ia tidak boleh digunakan untuk mengatasi kuasa statutori nyata yang terletak hak pada pihak berkuasa negeri. Responden-responden menyatakan hujahan bahawa mereka telah mencabuli kebebasan asas perayu di bawah Perlembagaan D Persekutuan tidak berbangkit kerana keputusan yang dipersoalkan tersebut dibuat dengan mematuhi arahan yang diberikan oleh pihak berkuasa negeri.

Diputuskan, menolak rayuan:

E (1) Niat Parlimen untuk mengecualikan semakan kehakiman jelas dinyatakan oleh bahasa s 59A(1) Akta yang memang jelas dan tidak kabur. Perkataan dalam seksyen tersebut adalah jelas dan menyokong penamatan bidang kuasa mahkamah disingkirkan kecuali atas alasan ketidakpatuhan prosedur dengan kehendak Akta atau peraturan yang F mengawal tindakan atau keputusan dan tidak ada yang lain (lihat perenggan 17).

(2) Tidak terdapat merit dalam rayuan. Soalan undang-undang yang dikemukakan bagi penentuan dalam kes ini adalah sama seperti yang dikemukakan di dalam kes *Sugumar*. Fakta dan isu-isu dalam kedua-dua G kes adalah sama dan doktrin duluan memerintah bahawa kes-kes mesti diputuskan dalam cara yang sama apabila fakta material dan isu-isu mereka adalah sama. Keputusan dalam kes *Sugumar* tidak didasarkan ke atas alasan polisi awam tetapi semata-mata atas prinsip undang-undang. Tidak terdapat duluan lain atau kes yang diputuskan atas s 59A Akta H yang sama berat menerima cadangan yang bertentangan yang mana boleh diikut oleh mahkamah ini. Tidak terdapat sebab atau alasan untuk mahkamah ini menyimpang daripada keputusan dalam kes *Sugumar* yang mana secara betul diputuskan berdasarkan atas prinsip undang-undang yang jelas (lihat perenggan 34(a)–(d), 36 & 55). I

(3) Dakwaan perayu bahawa responden-responden telah melanggar kebebasan asas di bawah perkara 5(1), 8(1) dan 9(2) Perlembagaan Persekutuan adalah isu-isu yang telah diputuskan oleh Mahkamah Persekutuan di dalam kes *Sugumar*. Berkaitan kepada isu bahawa tiada

alasan diberikan bagi keputusan yang dipersoalkan tersebut, responden-responden adalah secara statutori tidak dikehendaki untuk memberi apa-apa alasan. Seperti yang diputuskan oleh Mahkamah Persekutuan di dalam kes *Sugumar*, s 65 Akta dia mengenakan tugas nyata ke atas responden-responden untukk memberi alasan kepada perayu. Responden pertama juga tidak boleh dijangka memberikan alasan-alasan memandangkan dia hanya menjalankan arahan pihak berkuasa negeri dan, di dalam menjalankan kuasa yang diberikan ke atasnya oleh s 65(1) Akta, pihak berkuasa negeri adalah tidak dikehendaki untuk memberi alasan-alasan (lihat perenggan 44 & 49).

(4) Hak untuk didengar tidak dinyatakan atau diperuntukkan di dalam ss 59 dan 65 Akta. Di bawah s 59, apa-apa perintah pihak berkuasa negeri tidak mengkehendaki peluang untuk didengar. Responden pertama tidak mempunyai bidang kuasa tetapi menolak kemasukan seperti yang diarahkan oleh pihak berkuasa negeri; maka, tindakan atau keputusannya juga menikmati pengecualian hak untuk didengar. Responden pertama dan pihak berkuasa negeri tidak boleh dikatakan menafikan perayu terhadap hak kepada keadilan semulajadi memandangkan tidak terdapat apa-apa pelanggaran apabila tiada yang wujud dari segi undang-undang. Dalam ketiadaan apa-apa peruntukan terhadap cara siasatan/hak untuk didengar dalam s 65 Akta, tiada soalan kegagalan untuk memerhati prinsip-prinsip keadilan semulajadi boleh berbangkitan (lihat perenggan 50).

(5) Walaupun perayu dibenarkan untuk memasuki Sabah sebelum ini tanpa bantahan atau halangan, ini tidak boleh menjadi asas untuknya bergantung ke atas doktrin harapan yang sah memandangkan: (a) afidavit-afidavit perayu tidak pernah menyatakan tujuan lawatannya yang lepas — sama ada ia adalah sebagai pelawat atau sebagai penceramah dalam apa-apa forum berikutan s 67 Akta; (b) tidak apa-apa dalam afidavit-afidavit perayu menunjukkan bahawa responden-responden membuat apa-apa janji atau representasi bahawa kemasukannya ke Sabah bagi tujuan s 67 tidak akan ditolak; (c) harapan yang sah tidak boleh dan patut mengatasi kuasa statutori nyata yang terletak hak pada pihak berkuasa negeri; dan (d) Akta secara nyata memperuntukkan bahawa pemberian permit/pas untuk masuk Sabah adalah dalam prerogatif atau kuasa budi bicara pihak berkuasa negeri. Dengan itu, tiada harapan yang sah substantif berbangkit memihak perayu (lihat perenggan 54).]

Notes

For cases on prohibition against entry in general, see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5344–5345.

Cases referred to

Abdul Salam bin Husin v Majlis Angkatan Tentera & Anor [2011] 2 MLJ 573; [2011] 2 CLJ 1, FC (refd)

Anisminic Ltd v Foreign Compensation Commission [1968] UKHL 6, HL (refd)

BODCO Engineering and Construction Sdn Bhd v Christopher ak Matthew Mattius & Anor and other applications [2016] 7 MLJ 275, HC (refd)

Breen v Amalgamated Engineering Union [1971] 1 All ER 1148, CA (refd)

Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corpn Ltd [1981] AC 909, HL (refd)

Council of Civil Service Unions v Minister for the Civil Service sub nom R v Secretary of State for Foreign and Commonwealth Affairs, ex p Council of Civil Service Unions [1985] AC 374, HL (refd)

Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd [2007] 4 CLJ 513, FC (refd)

Datuk Justine Jinggut v Pendaftar Pertubuhan [2012] 3 MLJ 212, CA (refd)

Hong Leong Equipment Sdn Bhd v Liew Fock Chuan and another appeal [1996] 1 MLJ 481, CA (refd)

Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd [2003] 3 MLJ 1, CA (refd)

Kelab Lumba Kuda Perak v Menteri Sumber Manusia, Malaysia & Anor [2005] 5 MLJ 193; [2005] 3 CLJ 512, CA (refd)

Law Pang Ching & Ors v Tawau Municipal Council & Ors [2009] 3 MLJ 452; [2010] 2 CLJ 821, CA (refd)

Lee Kwan Wah v PP [2009] 5 MLJ 301, FC (refd)

Majlis Agama Islam Wilayah Persekutuan v Victoria Jayaseele Martin and another appeal [2016] 2 MLJ 309; [2016] 4 CLJ 12, FC (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 MLJ 1, FC (refd)

Mak Sik Kwong v Minister of Home Affairs, Malaysia [1975] 2 MLJ 168 (refd)

Mohamed Ashraff & Anor v The Commissioner for Federal Capital, Kuala Lumpur & Anor [1972] 2 MLJ 69, FC (refd)

Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara [2002] 1 MLJ 321; [2001] 4 CLJ 70, FC (refd)

Nadarajah and another v Secretary of State for the Home Department [2005] EWCA Civ 1363, CA (refd)

Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v Mohd Noor Abdullah [2004] 2 CLJ 777, FC (refd)

North East Plantations Sdn Bhd lwn Pentadbir Tanah Daerah Dungun & Satu Lagi [2011] MLJU 1529; [2011] 4 CLJ 729, FC (refd)

O'Reilly v Mackman [1983] 2 AC 237, CA (refd)

Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan [2002] 3 MLJ 72, FC (folld)

PP v Yuneswaran a/l Ramaraj [2015] 6 MLJ 47, CA (refd)

R (on the application of The Asha Foundation) v Millenium Commission [2002] EWHC 916 (Admin), QBD (refd)

R v Higher Education Funding Council, ex parte Institute of Dental Surgery [1994] 1 All ER 651, QBD (refd)
R v North and East Devon Health Authority, ex parte Coughlan (Secretary of State for Health and another intervening) [2001] QB 213, CA (refd)
R v Secretary of State for the Home Department, ex parte Simms [2000] 2 AC 115, HL (refd)
Racal Communications Ltd, Re [1981] AC 374, HL (refd)
R (on the application of Morgan Grenfell & Co Ltd) v Special Comr of Income Tax [2002] UKHL 21, HL (refd)
SIS Forum (Malaysia) v Dato' Seri Syed Ismail bin Syed Jaafar Albar (Menteri Dalam Negeri) [2010] 2 MLJ 377, HC (refd)
Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333, FC (refd)
Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor [1998] 3 MLJ 289, CA (refd)
Sweeney v The Department of Highways [1933] OWB 783, CA (refd)
Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317, CA (refd)
UMW Equipment Sdn Bhd v Parantaman Ramasamy & Anor [2014] 3 MLJ 457, CA (refd)
Woolfrey v Piche [1958] 13 DLR (2nd) 605 (refd)
Zakariah bte Ishak v Majlis Daerah Hulu Selangor Darul Ehsan [2005] 6 MLJ 517, CA (refd)

Legislation referred to

Civil Law Act 1956 s 3(1)
Federal Constitution arts 5(1), 8(1), 9(2), 121, 121(1), 160(2)
Immigration Act 1959/63 ss 59, 59A, 59A(1), 65, 65(1), 66, 67
Pengurusan Danaharta Nasional Berhad Act 1998 s 72

Appeal from: Application For Judicial Review No BKI-13NCVC-6/1 of 2015(HC2) (High Court, Kota Kinabalu)

Michael Chow (Idrus & Tsai) for the appellant.
Rahazlan Affandi bin Abdul Rahim (Senior Federal Counsel, Attorney General's Chambers) for the first respondent.
Md Hanafiah Md Kassim (Senior State Counsel, State Attorney General's Chambers) for the second, third and fourth respondents.

Zawawi Salleh JCA (delivering judgment of the court):

INTRODUCTION

[1] This appeal is directed against the decision of the learned judicial commissioner ('JC') of the High Court of Sabah and Sarawak at Kota

Kinabalu, dated 15 March 2016, dismissing the appellant's application for judicial review dated 28 January 2015 with no order as to costs.

[2] We heard the appeal on 20 July 2017, at the end of which we unanimously dismissed the appeal and affirmed the decision of the learned JC. We now give the detailed reasons for our decision.

FACTS OF THE CASE

[3] The facts giving rise to this appeal, as culled from the written submissions of the parties, may be summarised as follows:

(a) the appellant intended to travel to Sabah on 25 November 2014 to speak at a forum. The said forum was to be held at Kota Kinabalu ('the KK Forum') and was organised by 'Negara-Ku', a people's movement advocating national unity;

(b) the appellant wrote a letter dated 11 November 2014 to first respondent to obtain confirmation that there would be no restriction for her to enter Sabah;

(c) on 14 November 2014, the first respondent replied that the appellant's 'application' had been referred to the state authority ('pihak berkuasa negeri') and was rejected;

(d) it was alleged by the appellant that:

(i) the sole purpose of her intended trip to Sabah was to participate in the KK Forum;

(ii) other speakers of the KK Forum from West Malaysia were allowed to enter Sabah; and

(iii) the appellant had, in the past, entered Sabah without objection or obstruction from the Sabah State Authority;

(e) the appellant then wrote a letter to the first respondent on 3 December 2014, asking for the reasons she was barred from entering Sabah;

(f) there has been no reply to the appellant's letter dated 3 December 2014;

(g) the appellant then filed an application for judicial review, seeking the following reliefs:

(i) an order of certiorari to quash the notice of refusal of entry into Sabah dated 14 November 2014 ('the impugned decision');

(ii) an order of mandamus to compel the respondents to allow the appellant entry into Sabah;

(iii) damages;

(iv) costs; and

(v) further relief as deemed fit and proper;

(h) the learned JC dismissed the appellant's application for judicial review on two grounds. The first was that the ouster clause in s 59A of the Immigration Act 1959/63 ('Act 155') in clear and explicit terms provide that any act done or decision made by the state authority under the Act is not subject to judicial review except on grounds of procedural non-compliance of the requirements of the Act. The second was that the focus of the court was to consider the decision — making process, and not whether the impugned decision was fair and reasonable; and

(i) being dissatisfied with the decision of the learned JC, the appellant appealed to this court. Hence, this appeal.

PARTIES' COMPETING SUBMISSIONS

[4] The nub of the appellant's submission was that the learned JC erred in relying on the case of *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72 ('*Sugumar*'s case') in support of his conclusion that the decision of the state authority was non-justiciable ('justiciability issue').

[5] Further, it was boldly submitted that in any event, *Sugumar*'s case was bad law for the following reasons:

(a) the current approach is that the court may consider itself not to be bound by ouster clauses, particularly where there is error of law. In *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317, the Court of Appeal refused to follow the Privy Council's decision in *Anisminic Ltd v Foreign Compensation Commission* [1968] UKHL 6 on the ground that the board had failed to truly appreciate the effect of the earlier House of Lords decision in *Anisminic* that had jettisoned the esoteric and obsolete distinction between errors of laws that went to jurisdiction and error of laws that did not;

(b) relying on, inter alia, the House of Lords cases of *Re Racal Communications* [1981] AC 374 and *O'Reilly v Mackman* [1983] 2 AC 237, the Court of Appeal recast our common law as follows:

> An inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or purely an administrative function, has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision-taker does make such an error, then he exceeds his jurisdiction. So too is jurisdiction exceeded, where resort is had to an unfair procedure or where the decision reached is unreasonable, in the sense that no

reasonable tribunal similarly circumstanced would have arrived at the impugned decision ...

Since an inferior tribunal has no jurisdiction to make an error of law, its decision will not be immunised from judicial review by an ouster clause however widely drafted.

(c) the Court of Appeal went on to declare that the 'categories of errors of law are not closed':

It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an *Anisminic* error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.

(see also *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1 (FC), *UMW Equipment Sdn Bhd v Parantaman Ramasamy & Anor* [2014] 3 MLJ 457 and *BODCO Engineering and Construction Sdn Bhd v Christopher ak Matthew Mattius & Anor and other applications* [2016] 7 MLJ 275);

(d) in support of her submission that *Sugumar*'s case was bad law and should not be followed, the appellant placed reliance on the decision of the Federal Court in *Lee Kwan Wah v Public Prosecutor* [2009] 5 MLJ 301 (FC), wherein the court stated at p 311, para 8:

... it is the duty of a court to adopt a prismatic approach when interpreting the fundamental rights guaranteed under Part II of the Constitution. When light passes through a prism it reveals its constituent colours. In the same way, the prismatic interpretive approach will reveal to the court the rights submerged in the concepts employed by the several provisions under Part II.

(e) reliance was also placed on the decision of the Federal Court in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333, wherein the Federal Court had this to say:

[5] The other principle of constitutional interpretation that is relevant to the present appeal is this. Provisos or restrictions that limit or derogate from a guaranteed right must be read restrictively. Take art 10(2)(c). It says that 'Parliament may by law impose ... (c) on the right conferred by para (c) of cl (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality'. Now although the article says 'restrictions', *the word 'reasonable' should be read into the provision* to qualify the width of the proviso. The reasons for reading the derogation as 'such reasonable restrictions' appear in the judgment of the

Court of Appeal in *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213; [2007] 1 CLJ 19 which reasons are now adopted as part of this judgment. (Emphasis added.);

(f) it was contended by the appellant that in *Sivarasa Rasiah*, the Federal Court stated in clear and unequivocal terms that the approach in *Sugumar*'s case 'must be rejected as being without merit' in respect of the narrow and restricted meaning of art 5(1) of the Federal Constitution; and

(g) the appellant also posited that the learned JC wrongly construed the intention of Parliament. Parliament's intention in introducing s 59A of Act 155 was to curb problem caused by illegal immigrations. As such, *Sugumar*'s case should not be applied and/or followed.

[6] Concerning merit issue, the appellant submitted that the learned JC's decision ought to be quashed on four separate grounds as follows:

(a) that the respondents breached the appellant's fundamental liberty as guaranteed by the Federal Constitution;

(b) that the respondents acted in excess or without jurisdiction, ultra vires, or with mala fide or abused power;

(c) that the respondents violated the appellant's legitimate expectations; and

(d) that the respondents acted in a '*Wednesbury* unreasonableness' manner.

[7] In reply, learned senior federal counsel appearing for the respondents submitted that the provisions of ss 59, 59A, 65, 66 and 67 of Act 155 are very clear. Thus, it is incumbent upon this court to give effect to those provisions without attempting to modify and qualify them, particularly where there is no ambiguity (see *Abdul Salam bin Husin v Majlis Angkatan Tentera & Anor* [2011] 2 MLJ 573; [2011] 2 CLJ 1).

[8] As regards merit issue, senior federal counsel submitted that since the first respondent's decision was made in compliance with the direction given by the state authority and/or in accordance with the law, the question that the respondents had violated the articles of the Federal Constitution did not arise. The respondents relied heavily on the decision of *Sugumar*'s case.

[9] The respondents posited that s 65 of Act 155 does not impose a statutory duty on the respondents to give reasons to the appellant or that the first respondent is required to afford the appellant an opportunity to be heard. It was contended by the respondents that there cannot be any breach where none of such rights exist in law (see *Nordin Hj Zakaria (Timbalan Ketua Polis*

Kelantan) & Anor v Mohd Noor Abdullah [2004] 2 CLJ 777).

[10] Concerning legitimate expectation, the respondents submitted that it was never averred in the appellant's affidavit and/or the contention was an afterthought. In any event, legitimate expectation cannot and should not override the express statutory power vested in the state authority (see *North East Plantations Sdn Bhd lwn Pentadbir Tanah Daerah Dungun & Satu Lagi* [2011] MLJU 1529; [2011] 4 CLJ 729 (FC)).

OUR DECISION

Legal framework

[11] Section 59A(1) of Act 155 provides:

> 59A(1) There shall be no judicial review in any court of any act done or any decision made by the Minister or the Director General, or in the case of an East Malaysia State, the State Authority, under this Act except in regard to any question relating to compliance with any procedural requirement of the Act or the regulations governing that act or decision.

[12] Section 59A(1) of Act 155 is drafted in the widest possible terms. It specifically provides for the exclusion of judicial review in any court of any act done or any decision made by the minister or the director general, or in the case of an East Malaysian State, the state authority, under the Act, save for non-procedural compliance.

[13] As a general principle, there is a long list of authorities in support of the view that where rights are taken away by legislation, this should be done unambiguously. Such an approach accords with the settled statutory rule of construction that if parliament is to enact a law that takes away rights or liberties, it must clearly say so.

[14] In *Sugumar*'s case, the Federal Court stated at pp 125–126 as follows:

> Thus, it is clear from the explanatory statement that the intention of Parliament in amending s 59A by providing new provisions is to exclude judicial review by the court of any act done or any decision ...
>
> ... the language in the present s 59A is explicit with respect to the exclusion of the judicial review by any court of any act or decision made by the minister, director general or the state authority under the Act except for non-compliance of any procedural requirement. Judicial review under the section is defined to include proceedings commenced by way of an application, writ or any other suit or action mentioned in para (2) of s 59A. By deliberately spelling out that there shall be no judicial review by the court of any act or decision of the minister or the decision-maker except for non-compliance of any procedural requirement,

Parliament must have intended that the section is conclusive on the exclusion of judicial review under the Act. A

[15] In the same vein, in *R (on the application of Morgan Grenfell & Co Ltd) v Special Comr of Income Tax* [2002] UKHL 21, a case relating to legal professional privilege, the House of Lords said: B

> ... the courts will ordinarily construe general words in a statute, although literally capable of having some startling or unreasonable consequence, such overriding fundamental human rights, as not having been intended to do so. An intention to override such rights must be expressly stated or appear by necessary implication. C

[16] Lord Hoffman in *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 has observed that:

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights ... The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. D E

[17] In our view, the words of s 59A(1) of Act 115 are clear and support the conclusion that the jurisdiction of the court is ousted, except on grounds of procedural non-compliance of the requirements of the Act or regulations governing the act or decision and nothing else. Therefore, the intention of Parliament to exclude judicial review is clearly manifested by the unmistakable and unambiguous language of s 59A(1) of Act 115. F G

Ouster clauses

[18] Broadly speaking, ouster clauses are legislative provisions that purport to prevent certain administrative decisions from being subject to judicial review. Such clauses thus serve as a signal to decision-makers that they may operate without fear and intervention by the courts at a later stage. One common kind of ouster clause is the total ouster or finality clause, which is inserted into a statute to indicate that the decision of a particular tribunal or authority is final and cannot be challenged in any court (see *Mark Aronson & Bruce Dyer, Judicial Review of Administrative Action* (2nd Ed, 2000) at p 678). H I

[19] The question of how they should be construed by the courts is a complex one. It involves looking at unusual history of the operation of the

clauses, and the complicated concepts of the proper limits of the executive power, the notion of 'parliamentary supremacy', the role of Judiciary and the importance of the public law value underlying judicial review.

[20] The main legal issue with ouster clause is whether it is in fact possible to exclude the jurisdiction of the courts by the use of carefully drafted provisions like s 59A of Act 155.

[21] The Malaysian court's approach in dealing with ouster clauses is discussed, inter alia, in *Sugumar*'s case. The case concerned the decision of the Sabah Immigration Authority to cancel the entry permit of the appellant to reside in the State of Sabah. The appellant subsequently sought judicial review of the administrative decision of the Sabah Immigration Authority via certiorari. The Court of Appeal (see *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289 (CA)) held that the personal liberty under art 5(1) of the Federal Constitution included the liberty of an aggrieved person to seek relief in court (inter alia, via judicial review). Thus, a statutory provision ousting the powers of judicial review, would be inconsistent with this fundamental liberty of access to the Judiciary.

[22] It was also held that statutory ouster clauses shall only apply in a limited sense to those administrative acts and decisions not infected by an error of law. In addition, Gopal Sri Ram JCA (as he then was) held that an administrative decision may be reviewed on the grounds of substantive fairness (ie the decision must be 'reasonable' and the punishment imposed should not be disproportionate to the alleged wrong doing).

[23] It is pertinent to note that Federal Court subsequently reversed the decision of the Court of Appeal (see *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72). The Federal Court held that the constitutional rights under art 5(1) of the Federal Constitution can be removed in accordance with law as constitutional rights are not absolute. It was held that the effect of the ouster clauses was clearly intended by the Parliament to remove judicial review. Thus, the right to justice cannot be sustained in the face of an express statutory ouster of judicial review.

[24] Another important case is *Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd* [2003] 3 MLJ 1 ('*Danaharta* case'). The case involved the non-availability of judicial remedies (injunctions) against the Malaysian national asset company, Pengurusan Danaharta Nasional Bhd ('Danaharta') in the wake of the Asian economic crisis pursuant to the Pengurusan Danaharta Nasional Berhad Act 1998 ('the Danaharta Act'). The salient facts are as follows: a bank lent monies to a borrower and in order to secure the loan, the plaintiff created a third party charge over certain pieces of land in favour of the bank. The

borrower defaulted on the payment and judgment in default was obtained against the borrower. The bank subsequently issued the plaintiff a fresh notice demanding payment for the sum owing by the borrower to the bank. Whilst the loan remained unpaid, the Danaharta Act came into force. As a result, the loan and charge, under which rights and remedies originally vested in the bank, became vested in Danaharta Urus Sdn Bhd (the wholly-owned subsidiary of Danaharta) via the Danaharta Act.

[25] The plaintiff's application for an interlocutory injunction against the defendant to restrain the latter from selling the charged land was dismissed by the High Court. The High Court held that it had no jurisdiction to issue the injunction under s 72 of the Danaharta Act. Essentially, s 72 bars a court from making an order to stay, restrain or affect the powers and actions of Danaharta. The ambit of the provision is indeed very wide. It applies not merely to Danaharta, but a whole host of other entities mentioned in s 72. Apart from injunctions, it could also apply to orders for mandamus and certiorari. The width and applicability of s 72 throws into greater relief the issue of its constitutionality.

[26] On appeal, the Malaysian Court of Appeal in *Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd* [2003] 3 MLJ 1 (CA)) reversed the High Court's decision. The Court of Appeal ruled that s 72 was unconstitutional as it violated art 8(1) of the Federal Constitution. What is significant for our present purposes is the Court of Appeal's detailed examination of the right of access to justice in the Federal Constitution. In this regard, Gopal Sri Ram JCA ruled that the definition of 'law' in the Federal Constitution is 'not exhaustive', but 'open ended' by reference, inter alia, to art 160(2) of the Federal Constitution. The learned judge said that:

> It therefore refers to a system of law that is fair and just. In our judgment, art 8(1) is a codification of *Dicey*'s rule of law. Article 8(1) emphasises that this is a country where government is according to the rule of law ...

[27] In overruling the Court of Appeal's decision, the Federal Court in *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd* [2007] 4 CLJ 513 stated that the common law right of access to justice 'cannot amount to a guaranteed fundamental right'. The common law is qualified and not absolute. Unlike the Court of Appeal, the Federal Court focused on the definition of 'law' in art 160(2) of the Federal Constitution which includes 'the common law in so far as it is in operation in the Federation'. Hence, art 160(2) refers to the law which has already been brought into operation as the common law of the Federation. In this regard, the Federal Court also referred to s 3(1) of the Civil Law Act 1956, which provides that, except as otherwise provided in other written law, the Malaysian courts shall apply the common law of England and the rules of equity as administered in England as of 7 April 1956 (in respect of

A West Malaysia) subject to local circumstances. According to the Federal Court, this meant that the common law could be modified after 7 April 1956 by written law. Thus, the right of access to justice is one that can be modified by written law (in this case, the Danaharta Act).

B **[28]** The Federal Court also placed emphasis on art 121(1) of the Federal Constitution. This provision states that the High Court shall have such jurisdiction and powers as may be conferred by or under federal law. The Federal Court began by quoting Lord Diplock in *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corpn Ltd* [1981] AC 909 that every C citizen should have a 'constitutional right of access' to the courts of justice to obtain remedies.

[29] However, the Federal Court referred, in the next breath, to access to D justice under art 8(1) as a 'general right', in contrast to the Court of Appeal's treatment of access to justice as a fundamental liberty under the Constitution. Whilst the Federal Court stated that arts 8(1) and 121(1) 'complement' each other, it was of the view that art 121 on the jurisdiction and powers of the court is 'clearly the dominant element which determines the boundaries of access to E justice'. Thus, 'access to justice shall be available only to the extent that the courts are empowered to administer justice'.

[30] The Federal Court proceeded to add that '(t)he right is determined by the justiciability of the matter. If a matter is not justiciable, there is no right to F access to justice in respect of that matter. Thus, Parliament can enact a federal law pursuant to the authority conferred by art 121(1) to remove or restrict the jurisdiction and power of the court'.

[31] It was vehemently argued on behalf of the appellant that the Federal G Court's decision in *Sugumar*'s case on the scope of art 5(1) of the Federal Constitution is very narrow and restrictive. Indeed, the later Federal Court case of *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321; [2001] 4 CLJ 70 adopted a more liberal interpretation of art 5(1) of the Federal Constitution. It was submitted that it is doubtful whether the decision H in *Sugumar*'s case is still relevant and good law.

[32] Further, it was contended that Malaysian legal system is predicated on the rule of law. In general terms, the rule of law stands for the proposition that no one is above the law. It means the exercise of government power is subjected I to the control of the courts — and thus judicial review of administrative decisions is an important elements in maintaining the rule of law.

[33] At paras 19–24 of the appellant's written submission, the appellant submitted as follows:

19. It is good law in Malaysia that, with or without an ouster clause, the courts may still judicially review decisions of the executive. Hence, no ouster clause is absolute. A

20. Further, judicial review is undertaken not just to review the decision-making process, but also to determine whether the decision was rational and reasonable.

21. It is trite that courts will and must review any act/omission/decision/legislation that is alleged to be: B

(i) in contravention of the Federal Constitution, particularly, in violation of an individual's fundamental liberties.

(ii) made ultra vires or in error of law; C

(iii) grossly disproportionate and/or excessive; or

(iv) a violation of legitimate expectations.

22. Statute further confers power on the High Court to issue prerogative writs (eg certiorari, mandamus), particularly for the enforcement of the rights under Part II of the FC. The learned JC was thus incorrect to render the High Court toothless in the application. D

23. To dispel any further doubt, the courts have, time and time again, judicially reviewed executive decisions, despite the presence of ouster clauses in the relevant legislation. E

[34] We have given our anxious consideration to the submissions urged upon us on behalf of the appellant. We are not persuaded that the decision in *Sugumar*'s case was wrong and we should depart from it. Our reasons are as follows: F

(a) firstly, the facts and issues in *Sugumar*'s case and this instant appeal are the same. Doctrine of precedent dictates that cases must be decided in the same way when their material facts and issues are the same. In *Sweeney v The Department of Highways* [1933] OWB 783 (CA), Middleton JA for the Ontario Court of Appeal stated: G

> But, in my view, liberty to decide each case as you think right, with regard to principles laid down in previous similar cases, would only result in a completely uncertain law in which no citizen would know his rights or liabilities until he know before what judge his case would come and could guess what view that judge would take on a consideration of the matter, without any regard to previous decisions. H

(b) the decision in *Sugumar*'s case is not based upon grounds of public policy but on purely legal principles; I

(c) there is no other precedent or decided case on s 59A of Act 155 of equal weight which stands for the opposite proposition which this court should follow. The issues arising for determination in *Lee Kwan Wah* and *Sivarasa Rasiah* are not directly concerned with s 59A of Act 155 or the

power of the state authority to refuse entry but on general interpretation of art 5(1) of the Federal Constitution. Thus, there are no two conflicting decisions of the higher court on the same issue before us. In *Woolfrey v Piche* [1958] 13 DLR (2nd) 605, LeBel JA stated:

> ... but I am now faced with two conflicting decisions in this court on the same point, and in that unfortunate state of things I apprehend that I must choose between them as I have done. That is what was done in *Young v Bristol Aeroplane Co* [1944] 1 KB 718, where three exceptions to the application of the rule in *Velazquez* (the stare decisions rule) were stated ...

(d) in our view, the questions of law posed for determination in *Sugumar*'s case and in this instant appeal are the same. *Sugumar*'s case made a clear pronouncement on two important issues:

(i) by deliberately spelling out that there shall be no judicial review, Parliament must have intended that the section is conclusive on the exclusion of judicial review under the Act; and

(ii) by virtue of s 59A(1) of Act 155, the court shall be precluded from exercising its powers of judicial review to examine the validity of the exercise of administrative powers conferred by the Act on substantive ground/fairness;

(e) secondly, the Federal Court in *Sivarasa Rasiah*, barren of any reference to the earlier decision of the Supreme Court. In *Public Prosecutor v Yuneswaran a/l Ramaraj* [2015] 6 MLJ 47, this court had this to say:

> [61] With respect, in our view, the manner in which the Federal Court in *Sivarasa* went about on how to construe 'restrictions' was completely at variance with an earlier decision of the Supreme Court in *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566 where it was held as follows (at p 575D–H):
>
> > Insofar as restrictions on the Right to freedom of speech and expression is concerned, cl (2)(a) of art 10 permits restrictions on this Right by laws as Parliament deems necessary or expedient relating to matters undermining the security of the Federation or any part thereof, friendly relations with other countries, public order or morality or relating to defamation, incitement to any offence, contempt of court, privileges of Parliament or of any legislative assembly.
>
> Clearly, therefore, in Malaysia, the position of the court when considering an infringement of this right is different from that of the position of the court in India when considering an infringement of the equivalent right under the Indian Constitution.
>
> With regard to India, the Indian Constitution requires that the restrictions, even if within the limits prescribed, must be 'reasonable' — and so that court would be under a duty to decide on its reasonableness. But, with regard to Malaysia, when infringement of the right of freedom of speech and

expression is alleged, the scope of the court's inquiry is limited to the question whether the impugned law comes within the orbit of the permitted restrictions. So, for example, if the impugned law, in pith and substance, is a law relating to the subjects enumerated under the permitted restrictions found in cl 10(2)(a), the question whether it is reasonable does not arise; the law would be valid. Moreover, by cl (2) of art 4, it is not a ground for challenge that the restriction does not relate to one of the matters specified in art 10(2)(a) for taking a case outside the protection of that article (see *Assa Singh v Mentri Besar of Johore* at p 38).

To put it another way, art 4(2)(b) of the Constitution expressly prohibits the questioning of the validity of any law on the ground that such a law 'imposes restrictions as are mentioned in art 10(2) of the Federal Constitution but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in art 10(2)' (see *Public Prosecutor v Param Cumaraswamy* at p 517 col 2F–G). (Emphasis added.)

[35] In the same vein, the majority judgment of the Federal Court (per Md Raus Sharif PCA (now CJ)) in *Majlis Agama Islam Wilayah Persekutuan v Victoria Jayaseele Martin and another appeal* [2016] 2 MLJ 309; [2016] 4 CLJ 12 in dealing with art 5 of the Federal Constitution stated:

[140] I now discuss art 5. Under this article no person shall be deprived of his life or personal liberty save in accordance with law.

[141] The Court of Appeal in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; [1996] 2 CLJ 771 adopted a broad approach to the definition of 'life' legislated in art 5(1). For brevity, I find no necessity in reproducing the reasoning behind that broad approach. Suffice if I regurgitate what the court said through Gopal Sri Ram JCA:

... the expression 'life' does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are the rights to seek and be engaged in lawful and gainful employment ...

[142] The effect of the above approach (though in relation to the definition of 'life' and which regretfully failed to discuss the earlier case of *Government of Malaysia & Ors v Loh Wai Kong* (infra)) is that under art 5 the respondent is guaranteed of her fundamental right to livelihood; she is not to be deprived of her livelihood by a negative or restrictive provision. Needless to say r 10 in its current format, which negatives and restricts her rights, and acquiescing to Gopal Sri Ram's JCA point of view, would invariably infringe the respondent's constitutional rights.

[143] Lord Suffian LP, on the other hand, in *Government of Malaysia & Ors v Loh Wai Kong* [1979] 2 MLJ 33; [1979] 1 LNS 22, when discussing the issue at hand, stated that art 5 speaks of personal liberty and not of liberty simpliciter. This article only relates to the person or body of the individual. Personal liberty was held not to include certain rights, like right of travel or right to passport. The respondent there

had argued that the refusal or delay in granting him a passport violated his right of personal liberty under art 5.

[144] In the case of *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72; [2002] 4 CLJ 105, this court had occasion to state:

> In our view, the words 'personal liberty' should be given the meaning in the context of art 5 as a whole. In this respect, we adopt what has been said by Suffian LP in *Loh Wai Kong* ...

[145] Mohamed Dzaiddin FCJ in the above case also endorsed the following words of Suffian LP, which read:

> ... In the light of this principle, in construing 'personal liberty' in art 5 one must look at the other clauses of the article, and in doing so we are convinced that the article only guarantees a person, ... from being 'unlawfully detained ... It will be observed that these are all rights relating to the person or body of the individual ...

[146] In *Lo Pui Sang And Other v Mamata Kapildev Dave and Others (Horizon Partners Pte Ltd Intervener and Other Appeals* [2008] 4 SLR 754, when discussing art 9(1) of the Singapore Constitution (in pari materia with art 8(1) of the Federal Constitution), Choo Han Teck J said:

> I do not think that the phrase 'personal liberty' in art 9 was a reference to a right of personal liberty to contract. It has always been understood to refer only to the personal liberty of a person against unlawful incarceration or detention.

[147] It cannot be overly emphasised that the Federal Constitution has meticulously delineated matters of fundamental liberties, as set out in Part II of the Federal Constitution, consisting of arts 5–13. They are provisions that:

(a) ensure the liberty of the person (art 5);

(b) prohibit slavery and forced labour (art 6);

(c) provide protection against retrospective criminal laws and repeated trials (art 7);

(d) legislate equality before the law and the rights to equal protection of the law (art 8) regardless of citizenship;

(e) lay down the prohibition of banishment and freedom of movement (art 9);

(f) promulgate freedom of speech, assembly and association (art 10);

(g) ensure freedom of religion (art 11);

(h) confirm the rights in respect of education (art 12); and

(i) provisions that guarantee protection to property (art 13).

[148] Despite such guarantees, the Federal Constitution on the other hand provides that Parliament, pursuant to Part XI under art 149, may in certain circumstances pass laws that may be inconsistent with arts 5, 9 or 10. Under art 150 the Yang

di-Pertuan Agong under certain circumstances may proclaim an emergency and Parliament may pass laws that may be inconsistent with the provisions of the Constitution including provisions for fundamental liberties (*The Constitution of Malaysia* by M Suffian). In short, despite the liberties being fundamental and guaranteed by the Constitution 'they are not immutable or beyond the periphery of the amendatory powers of Parliament' (*Federal Constitution of Malaysia* commentary by KV Padmanabha Rau).

[149] A quick scrutiny of those nine articles show that each and every article, as articulated in them, has a peculiar role and purpose. I therefore am inclined to adopt the approach of Suffian LP in *Government of Malaysia & Ors v Loh Wai Kong* that art 5 is meant to deal with issues of personal liberty only. It should not import certain other rights, say, as elucidated above, a right to a passport or right of travel. Such rights are more akin to privileges than rights of life or personal liberty matters, which are more suitable to fall under art 9. On that premise, with her personal liberty never compromised or in danger, I hold that the issue of livelihood in relation to her being denied admission as a Peguam Syarie falls outside the ambit of art 5. Article 5 thus is of no help to the respondent.

[36] It is clear, therefore, that the latest Federal Court's decisions in *Public Prosecutor v Yuneswaran a/l Ramaraj* and *Majlis Agama Islam Wilayah Persekutuan v Victoria Jayaseele Martin and another appeal* had rejected the approach adopted by *Lee Kwan Wah v Public Prosecutor* and *Sivarasa Rasiah* in interpreting art 5(1) of the Federal Constitution. Therefore, there is no rhyme or reason for us to depart from the decision of *Sugumar*'s case. In our view, *Sugumar*'s case was correctly decided based on sound principle of law.

Merit issue

[37] The appellant further submitted that if this court is not with her on justiciability issue, then, even limited to the wording of the ouster clause, there remains the fact that there was non-compliance with the prescribed procedure.

[38] It was vehemently contended on behalf of the appellant that the impugned decision was in excess or without jurisdiction, ultra vires, or with mala fides or abused of powers as it was made:

(a) in non-compliance of specific and express procedure; and/or,

(b) in non-compliance with applicable principles relevant to the executive.

[39] As regards issue (a), it was submitted that the specific procedure for the appellant to obtain documentation to enter Sabah was to produce her IC. In spite of the appellant having complied with the prescribed procedure, the respondent refused to allow entry into Sabah. Thus, this is a clear instance of procedural non-compliance.

[40] As regards issue (b), it was contended that the respondents in carrying out their prerogative powers, are subject to the following principles:

(i) that no discretion is unfettered; and/or

(ii) that irrelevant consideration cannot be taken into account.

[41] The appellant also submitted that she had two legitimate expectations:

(i) the expectation to be treated equally and to be allowed entry into Sabah again; and

(ii) the expectation that there would be valid reasons for the impugned decision and that the appellant would be given the right to be heard.

[42] Finally, the appellant posited that the respondents had a duty to give reasons for the impugned decision.

[43] We have carefully considered the submissions urged upon us on behalf of the appellant on merit issue. We are not persuaded that submissions are well founded. Most of the issues raised by the appellant had already been carefully addressed and decided in *Sugumar*'s case. In our view, this is an attempt to reargue the issues.

[44] Concerning the appellant's allegation that the respondents had breached the appellant's fundamental liberty as guaranteed under art 5(1), 8(1) and 9(2) of the Federal Constitution, the Federal Court in *Sugumar*'s case had already canvassed these issues and held that:

> Secondly, art 8(1) provides that all persons are equal before the law and are entitled to the equal protection of the law. Equality before the law means the equal subjection of all persons to the law. See *Datuk Harun bin Haji Idrus*'s case, at p 117.
>
> Thirdly, art 9(2) gives the citizen the right to move freely throughout Malaysia and to reside in any part thereof. However, these rights are subject to cl (3), which according to Andrew Harding's *Law, Government and the Constitution in Malaysia* at p 225, 'clearly refers to Sabah and Sarawak, both of which enjoy such a special position. The purpose of the qualification is to ensure that constitutional challenges cannot be brought against these States in respect of the use of their special immigration powers, which may be used to control entry from Peninsular Malaysia'. See also *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia* [1979] 2 MLJ 101.
>
> It is clear from the authorities that the constitutional rights as guaranteed under art 5(1) of the Federal Constituent can be taken away in accordance with law. Hence, s 59 of the Act, which removes the audi alterem partem rule, which was duly enacted by Parliament is valid and constitutional.

> In view of the presumption of constitutionality of an Act of Parliament and here the burden of showing otherwise is on the respondent which he has not satisfied us, it is our conclusion that s 59 of the Act is valid and constitutional.

[45] Further, the appellant's contention that the respondents breached the appellant's fundamental liberties touched on the issue of substantive grounds/fairness. The doctrine of substantive fairness cannot be invoked as a separate or additional ground of judicial review of an administrative decision when Parliament had expressly excluded judicial review under the Act. The Federal Court had stated conclusively in *Sugumar*'s case at pp 126–128 as follows:

> We pause to note here that the Court of Appeal seems to introduce the doctrine of substantive fairness as a separate ground in its review of the administrative decision of the state authority under the Act by invoking art 8(1) read together with art 5(1) of the Federal Constitution. The court also relied on *Rama Chandran*. See pp 125 and 128.
>
> ... we cannot agree with the Court of Appeal that the doctrine of substantive fairness can be invoked as a separate or additional ground of judicial review of an administrative decision. Here, on a clear wording of s 59A, in our view, Parliament must have intended to conclusively exclude judicial review except on procedural defect under the Act or regulations made thereunder.

Duty to give reason

[46] The appellant submitted that the trend of law has been towards an increased recognition of the duty upon decision-makers of many kinds to give reasons. In support of her submission, reliance was placed on the following cases:

(a) *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1 (FC);

(b) *Datuk Justine Jinggut v Pendaftar Pertubuhan* [2012] 3 MLJ 212;

(c) *Kelab Lumba Kuda Perak v Menteri Sumber Manusia, Malaysia & Anor* [2005] 5 MLJ 193; [2005] 3 CLJ 512; and

(d) *Hong Leong Equipment Sdn Bhd v Liew Fock Chuan and another appeal* [1996] 1 MLJ 481.

[47] As a general principle, we agree with the proposition that persons affected by administrative decisions have a right to know the reasons on which they are based, in short, to understand them. At the very least, the decision maker must be able to justify his/her decision. Indeed, Lord Woolf regards 'the giving of satisfactory reasons for a decision as being the hallmark of good administration' (see *Woolf, Protection of the Public*, p 92). The giving of reasons

is considered to be inextricably bound up with natural justice or the right to be fairly heard and is fundamentally important as a public law principle. It has been described by Lord Denning MR in *Breen v Amalgamated Engineering Union* [1971] 1 All ER 1148 at p 1154 as 'one of the fundamentals of good administration'.

[48] Having said that, we hasten to add that the common law duty to give reasons has not found favour in most commonwealth jurisdictions. The disadvantages of giving reasons was outlined by Sedley J in *R v Higher Education Funding Council, ex parte Institute of Dental Surgery* [1994] 1 All ER 651 at p 665 and restated in 2003 in *R (on the application of The Asha Foundation) v Millenium Commission* [2002] EWHC 916 (Admin):

> It may place an undue burden on decision-makers; demand an appearance of unanimity where there is diversity; call for the articulation of sometimes inexpressible value judgments; and offer an invitation to the captious to comb the reasons for previously unsuspected grounds of challenge.
>
> It has also been said that the great majority of cases are not likely to raise substantial points of law and the requirement is also an undue drain on resources.

[49] In this instant appeal, statutorily, the respondents were not required to give reasons as affirmed as the Federal Court in *Sugumar*'s case at pp 107–108 (held 4):

(a) s 65 of Act 155 does not impose an express statutory duty on the respondents to give reasons to the appellant;

(b) the first respondent could not be expected to provide reasons to the appellant since he was merely carrying out the directions of the state authority;

(c) accordingly, in the exercise of the powers conferred upon the state authority by s 65(1) of Act 155, the state authority was not required to give reasons; and

(d) it followed, therefore, that any reasons furnished by the state authority later in court proceedings cannot also be examined and taken into account.

Right to be heard

[50] In this instant appeal, it would be pertinent to note the following:

(a) the right to be heard is not stipulated or provided in ss 59 and 65 of Act 155;

(b) s 59 of Act 155 provides that any order of the state authority does not require the giving of an opportunity to be heard. In this instant appeal,

the first respondent has no discretion but to refuse the entry as directed by the state authority. Hence, the act or the decision of the first respondent also enjoys the exclusion of the right to be heard;

(c) the first respondent and the state authority cannot be said to have deprived the appellant of the right to the natural justice as there cannot be any breach where none exist in law (see *Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v Mohd Noor Abdullah* [2004] 2 CLJ 777, at p 779); and

(d) in the absence of any provision as to the mode of inquiry/right to be heard in s 65 of Act 155, no question of failure to observe the principles of natural justice could arise (per Ong Hock Sim FJ at p 72 in *Mohamed Ashraff & Anor v The Commissioner for Federal Capital, Kuala Lumpur & Anor* [1972] 2 MLJ 69) per Abdoolcader J at pp 172–173 in *Mak Sik Kwong v Minister of Home Affairs, Malaysia* [1975] 2 MLJ 168.

Legitimate expectation

[51] It was submitted that the legitimate expectation of the appellant in this case is two-fold:

(a) legitimate expectation to be treated equally and to be allowed entry into Sabah as had occurred previously; and

(b) legitimate expectation that there are good reasons for the impugned decision and that the appellant would be given the right to be heard.

[52] The principle of legitimate expectation has been accepted by our law (see, inter alia, *Law Pang Ching & Ors v Tawau Municipal Council & Ors* [2009] 3 MLJ 452; [2010] 2 CLJ 821; *SIS Forum (Malaysia) v Dato' Seri Syed Ismail bin Syed Jaafar Albar (Menteri Dalam Negeri)* [2010] 2 MLJ 377). The doctrine of legitimate expectation protects both procedural and substantive rights.

[53] The doctrine of legitimate expectation originates from common law principles of fairness. English courts developed this doctrine clearly to encourage good administration and prevent-abuses by decision-makers (see Peter Leyland, Gordon Anthony (2009), 'Legitimate Expectation'; Textbook on *Administrative Law* (6th Ed), Oxford New York, NY: Oxford University Press, at pp 313–330). Generally, the courts will grant judicial review of an administrative decision based on individual's legitimate expectation if a public authority has made a representation to the individual within its powers. The individual has to show that the representation was a clear and unambiguous promise, an established practice or a public announcement. This is largely a factual inquiry (see *R v North and East Devon Health Authority, ex parte*

Coughlan (Secretary of State for Health and another intervening) [2001] QB 213 (CA)) and *Nadarajah and another v Secretary of State for the Home Department* [2005] EWCA Civ 1363).

[54] In this instant appeal, we agree with the submission of learned senior federal counsel that although the appellant had travelled to Sabah in the past and on 8 April 2014 and she was allowed entry into Sabah without objection or obstruction; still that could not be made as a basis for the appellant to rely on the doctrine of legitimate expectation since:

(a) it was never stated in the appellant's affidavits as to the purpose of her past visit — whether it was for personal trip as a normal tourist or as a speaker in any forum pursuant to s 67 of Act 155;

(b) there was nothing in the appellant's affidavits to show that there was a promise or representation ever made by the respondents in the past that her entry to Sabah for the alleged purpose under s 67 of Act 155 would not be refused. Following the dictum of Lord Fraser Tullybeltton in the case of *Council of Civil Service Unions v Minister for the Civil Service sub nom R v Secretary of State for Foreign and Commonwealth Affairs, ex p Council of Civil Service Unions* [1985] AC 374, that legitimate expectation arises 'either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue', in our view, no substantive legitimate expectation arose in the appellant's favour.
(See also *Zakariah bte Ishak v Majlis Daerah Hulu Selangor Darul Ehsan* [2005] 6 MLJ 517);

(c) legitimate expectation cannot and should not override the express statutory power vested in the state authority.
(See *North East Plantations Sdn Bhd lwn Pentadbir Tanah Daerah Dungun & Satu Lagi* [2011] MLJU 1529; [2011] 4 CLJ 729 (FC) at p 733); and

(d) it was misconceived for the appellant to argue that the impugned decision was in breach of her legitimate expectation given the express provisions of the Act 155 that such entry permit/pass was within the prerogative or discretionary power of the state authority.

CONCLUSION

[55] For the foregoing reasons, we did not find any merit in the appeal. Accordingly we had dismissed the appeal with no order as to costs. So ordered.

Appeal dismissed.

Reported by Ashok Kumar